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SUPREME COURT, U.S.

NO. 81-5840

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CURFEW DAVIS,

Petitioner,

v.

WALTER D. ZANT,
WARDEN, GEORGIA
DIAGNOSTIC AND
CLASSIFICATION
CENTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether Petitioner's challenge to the constitutionality of Ga. Laws 1966, p. 502 as amended [Ga. Code Ann. § 38-801(d)] is properly before this Court?

2.

Whether Petitioner should be allowed to proceed on this petition without prepayment of costs and without compliance with this Court's Rule 53?

TABLE OF AUTHORITIES

Cases cited:	Page(s)
Cardinale v. Louisiana, 394 U.S. 437 (1969)	6
Davis v. Georgia, 439 U.S. 947 (1978)	2
Davis v. State, 236 Ga. 804, 225 S.E.2d 241 (1976)	1, 2
Davis v. State, 429 U.S. 122 (1976).	1
Davis v. State, 238 Ga. 295, 232 S.E.2d 565 (1977)	2
Davis v. State, 241 Ga. 376, 247 S.E.2d 45 (1978), cert. den., 439 U.S. 947 (1978).	2
State of Georgia v. Davis, 246 Ga. 200, 269 S.E.2d 461, cert. den., 449 U.S. 1057 (1980) . .	6

Statutes and Rules Cited:

Ga. Code Ann. § 38-801(d).	i,3,4,5,6
United States Supreme Court Rule 53	i, 8

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BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

(i)

On November 12, 1974 Petitioner was convicted of murder in the Superior Court of Troup County, Georgia upon Indictment No. 620/124. On that same day a sentence of death was imposed. On direct appeal to the Supreme Court of Georgia Petitioner's conviction and sentence were affirmed at Davis v. State, 236 Ga. 804, 225 S.E.2d 241 (1976). On certiorari to the United States Supreme Court Petitioner's conviction was affirmed but his sentence of death was vacated at Davis v. State, 429 U.S. 122 (1976). On remand from the United States Supreme Court the

Supreme Court of Georgia vacated Petitioner's sentence as instructed and remanded Petitioner's case to the trial court for a new trial on sentencing at Davis v. State, 238 Ga. 295, 232 S.E.2d 565 (1977).

On retrial on the sentencing phase Petitioner was again sentenced to death on June 18, 1977. On direct appeal to the Supreme Court of Georgia Petitioner's sentence was affirmed at Davis v. State, 241 Ga. 376, 247 S.E.2d 45 (1978). A petition for a writ of certiorari was denied by this Court at Davis v. Georgia, 439 U.S. 947 (1978).

From the denial of relief on direct appeal Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia on or about February 13, 1981. After two amendments to his petition for the writ the Petitioner was afforded a habeas evidentiary hearing on April 2, 1981.

On July 16, 1981 the state habeas court rendered its order denying Petitioner habeas relief, and on September 8, 1981 the Supreme Court of Georgia denied Petitioner's application for a certificate of probable cause to appeal the adverse decision of the state habeas court.

On or about December 7, 1981 Petitioner filed this instant application for the writ of certiorari to be directed to the state habeas court.

(ii)

The facts which gave rise to Petitioner's conviction are succinctly set forth in Davis v. State, 236 Ga. 804, 225 S.E.2d 241 (1976), and because the underlying facts of Petitioner's conviction have no direct bearing upon the

legal issues presented on this instant application for a writ of certiorari for the purpose of brevity the same will not be repeated herein.

PART TWO

ARGUMENT AND CITATION OF AUTHORITY

A. PETITIONER'S CHALLENGE TO THE CONSTITUTIONALITY OF GA. LAWS 1966, p. 502 AS AMENDED, [HEREINAFTER REFERRED TO AS GA. CODE ANN. § 38-801(d)] IS NOT PROPERLY BEFORE THIS COURT ON THIS PETITION.
(Contention No. 1).

On this petition for a writ of certiorari Petitioner seeks to challenge the constitutionality of Ga. Code Ann. § 38-801(d) under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Specifically, Petitioner contends that Ga. Code Ann. § 38-801(d), as set forth below, deprives him of (1) the equal protection of the law, (2) meaningful access to the courts and (3) compulsory process to compel the attendance of witnesses in his behalf as guaranteed by the Sixth and Fourteenth Amendments. (Petitioner's Brief at 2).

> (d) Fees; Mileage. - The witness fee shall be $10.00 per diem, and execution shall be issued by the clerk upon affidavit of the witness to enforce payment thereof. The payment of fees shall not be demanded as a condition precedent to attendance, but when a witness resides outside the county where the testimony is to be given, service of the subpoena to be valid must be accompanied by the tender of the fee for one day's attendance

> plus mileage of 20 cents per mile for travelling expenses for going from and returning to his place of residence by the nearest practical route. Tender of fees and mileage may be made by United States currency or postal money order, or by cashier's or certified check. When the subpoena is issued on behalf of the state, or an officer, agency or political subdivision thereof, or a defendant in a criminal case, fees and mileage need not be tendered. Ga. Code Ann. § 38-801(d).

Petitioner first sought to raise this subject issue by way of a motion for witness fees filed on or about March 17, 1981 in the state habeas court. (Respondent's Exhibit I). As is revealed by an examination of the attached exhibit Petitioner merely contended that he was indigent and unable to pay the required witness fee which was to be tendered along with service of any subpoenas. Nowhere in Respondent's Exhibit No. 1 however, did Petitioner (1) identify specifically those witnesses he deemed necessary or (2) the subject of their testimony. Neither did Petitioner (3) state or represent that he had contacted these witnesses to ascertain whether they would voluntarily attend Petitioner's habeas proceeding or (4) state whether he [Petitioner] had perfected service of any subpoenas, minus witness fess, upon these unidentified potential witnesses. Further, (5) Petitioner completely failed to state that he had or had not attempted to obtain these individuals' testimony by other means, i.e., affidavits or personally recorded and mutally consented to depositions.

At Petitioner's habeas evidentiary hearing counsel for Petitioner addressed none of the queries posed above. As stated, though incorrectly quoted by Petitioner at page 4 of his brief, at the habeas evidentiary hearing counsel for Respondent stipulated that ". . . if they [counsel for Petitioner] had money, they could certainly make subpoenas binding and make these people come into court to testify." Petitioner's Exhibit E at 9. Contrary to Petitioner's characterization of the facts however, counsel for Respondent did not ". . . further stipulate that the witnesses were needed to testify concerning the allegations of the petition." (Petitioner's Brief at 4).

Aside from the foregoing references to the question of witness fees there exists little else on this topic in the record of the proceedings before the state habeas court.[1/]

From the denial of relief by the state habeas court Petitioner filed an application for a certificate of probable cause to appeal in the Supreme Court of Georgia. (Respondent's Exhibit II). In his twenty-three page application Petitioner devoted only the following passing reference, without citation of any legal authority, to the issue of the constitutionality of Ga. Code Ann. § 38-801(d).

> The habeas corpus court refused to pay the costs of subpoenas and mileage for applicant's witnesses, although applicant is an indigent person imprisoned on death row, who is wholly without funds to pay the required attendance and mileage fees. Applicant was

1/ Petitioner completely abandoned the issue of the constitutionality of Ga. Code Ann. § 38-801(d) and did not address the question at all in a post-habeas evidentiary hearing brief filed in the habeas court on April 16, 1981.

therefore unable to subpoena numerous witnesses who could have presented relevant, probative and necessary evidence. (Respondent's Exhibit II at 3).

As the foregoing quoted portion of Petitioner's application for a certificate of probable cause to appeal reveals, Petitioner completely failed to (1) clearly set forth a challenge to the constitutionality of Ga. Code Ann. § 38-801(d), (2) to cite authority in support of his position [which failure waives the issue under Supreme Court of Georgia Rule 45] and (3) Petitioner failed to refer in the record to any evidence in support of his contention.[2/]

Based upon this inartfully formulated record Petitioner, for the first time on this petition, clearly sets forth his desire to litigate the constitutionality of Ga. Code Ann. § 38-801(d). Because neither this allegation, nor any evidence in support of the same has ever been squarely presented to the state courts for resolution this allegation cannot serve as the basis for the granting of the requested writ of certiorari. Cardinale v. Louisiana, 394 U.S. 437 (1969).

Notwithstanding the fact that this improperly presented allegation cannot serve as the basis for the granting of the requested writ, Respondent notes that present counsel for Petitioner unsuccessfully litigated this same issue in State of Georgia v. Davis, 246 Ga. 200, 269 S.E.2d 461, cert. den., 449 U.S. 1057 (1980). In State of Georgia v. Davis, supra,

2/ Supreme Court of Georgia Rule 45 provides that "any enumerated error which is not supported by argument or citation of authority shall be deemed abandoned."

the Supreme Court of Georgia properly distinguished the very same cases cited by Petitioner in this instant petition in reaching its conclusion that this Petitioner was not entitled to the appointment of counsel nor access to public funds for the expense of litigation on a petition for a writ of habeas corpus.

> This court has repeatedly held that indigent habeas petitioners are not entitled to appointed counsel.(Cites omitted). Public funds are already provided for appointed counsel to represent indigent defendants at their trials and on their appeals as of right. However, we know of no statute, case, or constitutional provision which would permit a trial judge to appoint counsel to a habeas petitioner, to be paid out of state or city funds. Id., at 201.

Indeed, even on this instant petition Petitioner has still failed to cite such a "statute, case or constitutional provision . . .." Accordingly, this instant contention is without merit.

B. BECAUSE PETITIONER HAS COMPLETELY FAILED TO COMPLY WITH THIS COURT'S RULE 53 HE SHOULD NOT BE ALLOWED TO PROCEED ON THIS INSTANT PETITION WITHOUT PREPAYMENT OF COSTS.

An examination of the pleadings of the Petitioner reveals the absence of any affidavit from the Petitioner in support of his request to proceed in forma pauperis as is required by this Court's Rule 53(1). Accordingly, Petitioner should not be allowed to proceed on this petition without prepayment of costs.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Superior Court of Butts County, Georgia as it is manifest that no substantial federal question not previously decided by this Court has been properly presented and the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,

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IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

CURFEW DAVIS,

Petitioner,

vs.

WALTER D. ZANT, Warden, Georgia Diagnostic and Classification Center,

Respondent

HABEAS CORPUS No. 4962

MOTION FOR FUNDS FOR INVESTIGATION AND HEARING EXPENSES

Comes now, Curfew Davis and moves this Court for an order declaring Georgia Code Ann. §38-801(d), as amended, unconstitutional on its face and as applied to him, or, in the alternative, for an order awarding him funds with which to pay witness fees and mileage, and moves the Court for an order awarding him reasonable funds with which to pay for necessary investigative work and for consultation, fees and expenses of necessary expert witnesses in the pending habeas corpus proceedings. As grounds therefore, Petitioner shows the following:

I.

Witness Fees and Mileage

1. Curfew Davis is an indigent habeas corpus petitioner challenging his conviction and sentence of death. His petition alleges substantial state law and federal constitutional claims.

RESPONDENT'S EXHIBIT I

2. The Petitioner was tried and convicted in Troup County, Georgia, and was sentenced to death; he was re-tried on sentencing and again sentenced to death. He is now incarcerated in Butts County, Georgia at the Georgia Diagnostic and Classification Center at Jackson, Georgia.

3. Many of the witnesses necessary for the Petitioner to prove his allegations of illegal and unconstitutional conviction and sentences of death reside in Troup and Coweta Counties, Georgia, and other counties outside of Butts County. Butts County is the county where testimony is to be given.

4. Georgia Code Ann. §38-801(d), as amended, requires that tender of the witness fee ($10.00) plus mileage ($.20 per mile) be served with each subpoena in order for the subpoena to be valid when the witness resides outside the county where the testimony is to be given.

5. Curfew Davis, because of his indigency and his incarceration on death row at the Georgia Diagnostic and Classification Center, is unable to pay the necessary witness fees and mileage.

6. The respondent in this action is exempt from tendering the witness fees and mileage by Georgia Code Ann., Chapter 38 as amended, since the respondent is an officer of the State.

7. The relief requested is necessary to protect Petitioner's rights to compulsory process for the attendance of witnesses on his behalf, a full and fair hearing, effective assistance of counsel, due process and equal protection of law as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

II.

Investigators and Expert Witnesses

1. The services of an investigator and consultation with and testimony from qualified experts including statisticians, psychiatrists and social scientists will be necessary to prepare and prove the following claims, among others, at the evidentiary hearing in Petitioner's case:

a) Petitioner's claim that he was denied the effective assistance of counsel;

b) Petitioner's claim that his sentence of death was imposed (on re-trial) by a jury drawn from an unconstitutionally composed jury pool, by showing the composition of the traverse jury pool in Troup County, Georgia;

c) Petitioner's claim that striking for cause from the jury panel at Petitioner's trial and re-trial all people with scruples against the death penalty, and the court's refusal to strike for cause jurors who expressed certain fixed opinions concerning punishment, resulted in a jury that was biased in favor of the prosecution on the question of guilt or innocence and sentence.

d) Petitioner's claim that the death penalty is in fact administered and applied in an arbitrary and capricious manner within the State of Georgia.

e) Petitioner's claim that the Supreme Court of Georgia is not properly reviewing cases in which death as punishment is imposed.

f) Petitioner's claim that the population of Troup County was so prejudiced against him that it was impossible for him to receive a fair trial in Troup County;

g) Petitioner's claim that his rights to a fair trial before a neutral and detached judge (and his other equal protection and due process of law rights) were denied by the refusal of the trial court to disqualify the judge at Petitioner's re-trial.

2. The above requested funds for an investigator and expert witnesses are necessary to protect Petitioner's rights to present witnesses on his behalf, a fair proceeding, effective assistance of counsel, due process and equal protection of law as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

WHEREFORE, Petitioner moves this Court to grant an evidentiary hearing on this motion where Petitioner may present evidence on each of the allegations made to grant the relief requested herein.

Respectfully submitted,

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Joseph M. Nursey
Andrea I. Young

ATTORNEYS FOR PETITIONER

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing pleading to counsel for the opposing party, Mr. Arthur K. Bolton, Attorney General, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgia 30334; by placing same in the United States Mail with adequate postage attached thereon.

This 7th day of March, 1981.

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IN THE SUPREME COURT

STATE OF GEORGIA

Application No. _____

CURFEW DAVIS,

Applicant,

vs.

WALTER B. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent

APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE

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RESPONDENT'S EXHIBIT II

IN THE SUPREME COURT
OF THE STATE OF GEORGIA

CURFEW DAVIS,

Applicant,

vs.

WALTER D. ZANT,
Warden, Georgia Diagnostic
and Classification Center

APPLICATION NO. ____

APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE

On the following basis, Curfew Davis, by counsel, respectfully petitions this Court for a certificate of probable cause to appeal an order and judgment by the Butts County Superior Court denying his Petition for Writ of Habeas Corpus.

STATEMENT OF THE CASE

Curfew Davis was convicted of murder and sentenced to death in the Superior Court of Troup County; the conviction and sentence were affirmed by the Georgia Supreme Court. Davis v. State, 326 Ga. 804 (1976).

Subsequently, Applicant's death sentence was vacated by the United States Supreme Court. Davis v. Georgia, 439 U.S. 122 (1976).

On retrial on sentencing only, Applicant was again sentenced to death; the sentence was affirmed by the Georgia Supreme Court. Davis v. State, 241 Ga. 376 (1978). Certiorari was denied by the United States Supreme Court.

Applicant then filed suit in the Superior Court of Tattnall County seeking appointed counsel to file and litigate a state habeas corpus proceeding. The Superior Court of Tattnall County ordered that counsel be appointed to review Applicant's case and to file a petition for writ of habeas corpus if meritorious. The State of Georgia appealed this decision before any petition could be filed on Applicant's behalf.

The Supreme Court of Georgia reversed the judgment of the Tattnall County Superior Court. The Georgia Supreme Court held that indigent persons under sentnece of death have no right to appointed counsel in state habeas corpus proceedings. Davis v. State of Georgia, et. al., 246 Ga. 200 (1980). Certiorari was denied by the United States Supreme Court.

Applicant also challenged the constitutionality of his prior convictions which were obtained as a result of an invalid guilty plea from Applicant who was without assistance of counsel, in violation of his Sixth, Eighth and Fourteenth Amendment rights guaranteed by the United States Constitution. These prior convictions were put into evidence by the State as proof of aggravating circumstances. Applicant challenged the validity of these prior convictions in the Amendment to his Habeas Corpus Petition pursuant to Hunter v. Brown, 236 Ga. 168 (1976).

The relevant prior convictions are:

a) In the May, 1955 term of Troup Superior Court, (Indictment Number 2234) the Applicant was convicted of Larceny of a Motor Vehicle.

b) In the May, 1957 term of Troup Superior Court, the Applicant was convicted of Larceny of a Motor Vehicle (Indictment Number 2448, page 360).

c) In the August, 1959 term of Troup County Superior Court the Applicant was convicted of Larceny of a Motor Vehicle (Indictment Number 2946, pate 310).

d) In the April, 1960 term of Carroll County Superior Court the Applicant was convicted of Pointing a Pistol at another, Robbery by use of an offensive Weapon, Robbery by Force and Intimidation, and Larceny of a Motor Vehicle (Indictment Numbers 936, 937, 938, 939, page 231).

e) In the August, 1974 term of Troup County Superior Court, the Applicant was convicted of Motor Vehicle Theft (Indictment Number 588, page 1818).

Applicant Davis filed a petition for writ of habeas corpus in Butts County Superior Court, together with motions to obtain funds to pay for subpoenas and to obtain expert witnesses. The motions for funds were denied, as was the petition for writ of habeas corpus.

A Notice of Appeal was timely filed in the Superior Court of Butts County. (A copy of this Notice of Appeal is attached hereto as Appendix A).

1. Applicant was denied a full and fair state habeas corpus proceeding in violation of the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States by the orders of the habeas corpus court which refused to provide funds to pay Applicant's costs for the habeas corpus proceedings.

a) The habeas corpus court refused to pay the costs of subpoenas and mileage for Applicant's witnesses, although Applicant is an indigent person imprisoned on death row, who is wholly without funds to pay the required attendance and mileage fees. Applicant was therefore unable to subpoena numerous witnesses who could have presented relevant, probative and necessary evidence.

b) The habeas corpus court refused to provide Applicant with funds for investigative expenses and expert witnesses.

GROUNDS FOR GRANTING THIS APPLICATION

2. The proceeding by which the trial court heard Applicant's motion to disqualify Honorable Lamar Knight and the refusal of the trial court to disqualify Judge Knight as trial judge at Applicant's second trial violated Applicant's right to a fair trial before a neutral and detached judge, right to present witnesses in his behalf and confront and examine adverse witnesses, right to a reliable, non-arbitrary sentencing proceeding, right to equal protection and due process of law as guaranteed by the Georgia Constitution and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution:

a) Honorable Lamar Knight has a bias and prejudice against Applicant specifically and against black persons and indigent persons generally; he has a history of violating the constitutional rights of black and indigent persons.

b) Honorable Joseph Jackson should have been disqualified from presiding over the motion to disqualify Judge Knight. Judge Jackson's personal and professional friendship with Judge Knight made him disqualified from deciding the issue of Judge Knight's qualification. Also, in his statements from the bench, Judge Jackson indicated his bias and prejudice against Applicant's counsel.

c) Judge Lamar Knight, the ultimate trial judge, appointed Judge Jackson to hear the motion to disqualify Judge Lamar Knight. The pretrial motion hearing before Judge Jackson began with an opening remark by defense counsel, and the following ensued:

"We are prepared this morning to go forward with the motion as far as the disqualification of Judge Knight is concerned. This morning we had been advised by Judge Knight that he had appointed you to hear his disqualifications. We felt like probably maybe, as Eric Byrd in his book--and we are in that same dilemma--his 'I'm All Right; You're All Right"--the appointment of you, or the assignment of you of Judge Knight to the case; and then, when his disqualification was challenged, he assigned it back to you to determine that he is all right, we think is an improper assignment of the case. So this morning, after determining who would hear the disqualification of Judge Knight, we filed a disqualification of yourself because of the same--

THE COURT: You filed a motion to disqualify me?

MR. FARMER: Yes, sir.

THE COURT: This Court hasn't been served with any motion to disqualify me. This Court has no notice of it.

MR. FARMER: Well, the style is in the clerk's office, Your Honor.

THE COURT: Well, I think I ought to be served with it.

MR. FARMER: All right, Your Honor; I will accomplish that.

THE COURT: All right.

MR. FARMER: It has previously been served to the District Attorney and previously filed with this Court (presenting).

THE COURT: All right. I will rule on this motion to disqualify me that I have just been served. These cases, as the record reflects--

MR. FARMER: Your Honor, may I be heard on that?

THE COURT: No, I'm ruling now.

MR. FARMER: I would like to present our offer--

THE COURT: I read the motion.

MR. FARMER: May I make an offer of proof of what we would like to show.

THE COURT: No, I'm ruling on it right now. This Court, let the record reflect, came on the bench at 9:00 o'clock a.m. on May the 30th to determine whether or not the Honorable Lamar Kinght was qualified to served as judge on the motions filed in behalf of Curfew Davis. While the Court was on the bench, he was handed a motion to disqualify himself to hear Judge Knight's disqualifications.

> This Court rules that this is made for the purpose of delay only. Millard Farmer doesn't want to try this case, the merits of this case. I don't have a citation, but every judge we appoint has been a pattern of it. Every judge who has been appointed to hear him out and the first thing Mr. Farmer does is to file disqualification of the judge.
>
> All right. If we followed that line of reasoning, you could successfully disqualify every judge in the State of Georgia. The wheels of justice would break down. Every superior court in the State of Georgia would have to cease functioning. It couldn't have any trial.
>
> Now, I don't have a citation, but in the Court of Appeals, it was filed that all the judges in that Circuit be disqualified.
>
> However, the Court would like to rule further that the tactics of the defense attorney are not to try the merits of the case: it's for delay only, hoping that the trial judge will make some error.
>
> I will read now, and I want to make part of the record, an article that appeared in the Atlanta Journal on Tuesday evening, May the 17th, 1977.
>
> MR. FARMER: Your Honor, may we object to this type of admission of evidence" May we object to your doing this?
>
> THE COURT: I am ruling on your motion, Mr. Farmer. Anyway, this article written by Marcia Kunstel is entitled, 'Georgia's First in Line to Kill'. . ."
>
> (T. Tr. Vol I p. 8)

And the tirade of Judge Jackson continued with the reading of the entire newspaper article.

d) Applicant should have been allowed to present evidence to show Judge Jackson's disqualification.

e) Applicant should have been allowed to present evidence to show Judge Knight's bias and prejudice against black and indigent persons. An offer of proof was made of what evidence could have been presented.

f) There was no waiver of this issue by not bringing it to this Court on direct appeal.

3. Applicant was denied the effective assistance of counsel at his first trial, where the issue of guilt/innocence was decided, in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Among the instances of ineffective assistance of counsel are the following:

a) Trial counsel conducted no proper independent investigation of the facts of the case and failed to interview crucial state witnesses.

b) Trial counsel failed to adequately consult with Applicant before trial.

c) Trial counsel made no investigation of evidence on Applicant's behalf and presented no evidence on Applicant's behalf.

d) Trial counsel filed no challenge to the array of the grand or traverse jury pools in Troup County, although both were subject to challenge for unconstitutional underrepresentation of black persons, women and young persons.

e) Trial counsel filed no pretrial motions.

f) Trial counsel failed to conduct an adequate voir dire examination of prospective jurors.

g) Trial counsel failed to move for a change of venue, although there was massive prejudicial publicity against Applicant in Troup County.

h) Trial counsel failed to move the Court for funds for expert witnesses which were needed to adequately represent Applicant.

i) Trial counsel later testified that such expert witnesses were needed to adequately represent Applicant.

j) Trial counsel failed to move to suppress a .22 caliber pistol seized from Applicant's residence although the pistol was seized pursuant to an unlawful search and seizure without a warrant and without Applicant's consent. This pistol was introduced as evidence by the State to be the murder weapon.

k) Trial counsel failed to move to suppress statements allegedly made by Applicant pursuant to in-custody police interrogation. These statements were obtianed pursuant to an unlawful arrest of Applicant; these statements were obtained during a series of interrogations taking place almost daily over a period of a month without Applicant being afforded the assistance of counsel.

4. The aggravating circumstance set out in Georgia Code Ann. §27-2434.1(b)(7), upon which Applicant's sentence is partly based, is on its face, as applied in the State of Georgia and as applied in this case, impermissibly vague and overbroad in violation of rights protected by the Georgia Constitution and the Eighth and Fourteenth Amendments to the United States Constitution:

a) The trial court's instruction to the jury at the penalty phase of Applicant's trial merely reread the words of the §(b)(7) aggravating circumstance. The terms of the §(b)(7) aggravating circumstance were not defined.

b) The facts of Applicant's case, as a matter of law, are insufficient to prove a constitutional application of the §(b)(7) circumstance.

c) The Georgia Supreme Court did not adequately review or limit the application of the §(b)(7) circumstance in Applicant's case.

d) The Georgia Supreme Court's position in other cases that if more than one aggravating circumstance is found, then the striking of an unconstitutional aggravating circumstance will not affect the validity of the death penalty has been rejected by the United States Court of Appeals for the Fifth Circuit in Stephens v. Zant, No. 79-2407 (5th Cir. 1980).

5. Applicant's death sentence based in part on the aggravating circumstance set out in Georgia Code Ann. §27-2534.1(b)(1), was improper since the aggravating circumstance was based on Applicant's prior "conviction" for "capital felonies". These "convictions" were obtained through improper guilty pleas made by Applicant without the assistance of counsel.

Introduction of evidence of these unconstitutional convictions and the death sentence based on these unconstitutional convictions violated Applicant's right to a fair trial, a reliable non-arbitrary sentencing proceeding, effective assistance of counsel and due process of law as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

6. The trial court's charge to the jury during Applicant's first trial, at which the guilt/innocence issue was decided, created an unconstitutional presumption of the essential elements of malice and intent and thereby shifted the burden of proof on these essential elements from the State to the Applicant. This jury charge violated Applicant's rights to a fair trial and due process of law as guaranteed by the Georgia Constitution and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

7. At both of Applicant's trial, the State introduced statements allegedly made by Applicant pursuant to in-custody police interrogation. These statements were obtained pursuant to an arrest of Applicant made without probable cause and were obtianed pursuant to a series of interrogations taking place almost daily during a period of about one month during which Applicant was not afforded the assistance of counsel. Introduction of these statements violated Applicant's rights to a fair trial, protection against self-incrimination, right to effective assistance of counsel, protection against unreasonable search and siezure and right to a reliable, non-arbitrary sentencing proceeding as guaranteed by the Georgia Constitution and the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

8. At Applicant's first trial, the State introduced evidence of a .22 caliber pistol siezed from Applicant's residence. The State alleged that this pistol was the murder weapon. The search and siezure from Applicant's residence was made without a warrant, without probable cause and without Applicant's consent. This search and seizure violated Applicant's right against unreasonable search and siezure, right to a reliable, non-arbitrary sentencing proceeding and right to due process of law as guaranteed by the Georgia Constitution and the Fourth, Eighth and Fourteenth Amendments to the United States Constitution.

9. The trial court's denial of Applicant's motion for funds, filed before Applicant's second trial, for investigators and expert witnesses, denied Applicant's right to a fair trial, right to effective assistance of counsel, right to present mitigating circumstances, right to a reliable non-arbitrary sentencing proceeding, right to due process and equal protection of law as guaranteed by the Georgia Constitution and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

10. The trial court's denial of Applicant's motion for a change of venue, filed before Applicant's second trial, denied Applicant his right to a fair trial before an impartial jury, right to a reliable, non-arbitrary sentencing proceeding and right to due process of law as guaranteed by the Georgia Constitution and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

11. At Applicant's second trial, the State introduced evidence of Applicant's prior non-capital convictions. This evidence was not probative of any of the aggravating circumstances enumerated in Georgia Code Ann. §27-2534.1. Introduction of these non-statutory aggravating factors violated Applicant's right to a fair trial and injected an unreliable and arbitrary factor into the sentencing proceeding in violation of the Georgia Constitution and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

12. Improper and inflammatory comments made by the prosecutor during his closing argument at Applicant's trial deprived Applicant of his right to a fair trial, right to a reliable non-arbitrary sentencing determination and right to due process of law as guaranteed by the Georgia Constitution and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

13. The Applicant was indicted by an unconstitutionally composed grand jury since it was chosen from a grand jury pool which was composed in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

a) There was an intentional, discriminatory and systematic exclusion of women from the grand jury pool from which the jurors who heard evidence against the Petitioner was selected.

b) Prior grand jury lists of Troup County reveal a history and pattern of the intentional, discriminatory and systematic exclusion of women.

c) The jury commission which selects the jurors is unconstitutionally composed as women are systematically excluded and have no basis of appeal to obtain adequate representation.

d) Georgia Laws 1967, p. 726 [Ga. Code Ann. §59-112(b)] arbitrarily single out women who are housewives with children 14 years of age or younger for a special exemption from jury service, whether or not she is actually custodially responsible for said children or whether said children would or would not interfere with the woman's "responsibility" to serve on juries, and without regard to men who are similarly situated.

e) There was an intentional, discriminatory and systematic exclusion of black citizens from the grand jury list from which the jurors were selected who heard the evidence against the Applicant.

f) Prior grand jury lists of Troup County reveal a history and pattern of intentional, discriminatory and systematic exclusion of black persons.

g) The jury commission which selects the jurors is unconstitutionally composed as blacks are systematically excluded and have inadequate representation on said commission and have no basis of appeal to obtain adequate representation.

h) There was an intentional, discriminatory and systematic exclusion of young persons age 18-30 from the grand jury pool from which the jurors who heard evidence against the Applicant were selected.

i) Prior grand jury lists of Troup County reveal a history and pattern of intentional, discriminatory and systematic exclusion of young persons age 18-30 from the grand jury lists.

j) The jury commission which selects the jurors is unconstitutionally composed as young persons age 18-30 are systematically excluded and have inadequate representation on said commission and no basis of appeal to obtain adequate representation.

14. The Applicant was tried by unconstitutionally chosen juries at both trials since they were chosen from traverse jury pools which were composed in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States.

a) There was an intentional, discriminatory and systematic exclusion of women from the traverse jury pools from which the jurors who heard evidence against the Applicant were selected.

b) Prior traverse jury lists of Troup County reveal a history and pattern of the intentional, discriminatory and systematic exclusion of women.

c) The jury commissions which selected the jurors for both of Petitioner's trials were unconstitutionally composed as women are systematically excluded and have no basis of appeal to obtain adequate representation.

d) Georgia Laws 1967, p. 725 [Ga. Code Ann. §59-112(b)] arbitrarily singles out women who are housewives with children 14 years of age or younger for a special exemption from jury service whether or not she is actually custodially responsible for said children would or would not interfere with the woman's "responsibility" to serve on juries, and without regard to men who are similarly situated.

e) There was an intentional, discriminatory and systematic exclusion of black citizens from the traverse jury pools from which the jurors were selected who heard the evidence against Petitioner.

f) Prior traverse jury lists of Troup County reveal a history and pattern of intentional, discriminatory and systematic exclusion of black persons.

g) The jury commissions which selected the jurors were unconstitutionally composed as blacks are systematically excluded and have inadequate representation on said commission and no basis of appeal to obtain adequate representation.

h) There was an intentional and systematic exclusion of young people age 18-30 from the traverse jury pools from which the jurors who heard evidence against Petitioner were selected.

i) Prior traverse jury pools of Troup County reveal a history and pattern of the intentional, discriminatory and systematic exclusion of young people age 18-30.

j) The jury commissions wich selected the jurors were unconstitutionally composed as young people age 18-30 were systematically excluded and have no basis of appeal to obtain adequate represenation.

k) The trial court refusal to provide funds for an expert witness to investigate and compile the statistics for the jury pools impeded Applicant's ability to adequately present his jury challenge prior to his second trial.

15. The trial court's excusing for cause at Applicant's second trial jurors Ruben Haynes, Willie Cooper and Theotis Davenport, who expressed only general opposition to the death penalty, deprived Applicant of his right to a fair trial before a jury composed of a representative cross-section of the community, right to a reliable, non-arbitrary sentencing proceeding and right to due process of law as guaranteed by the Georgia Constitution and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

16. The trial court's refusal to excuse for cause at Applicant's second trial, jurors Alma Wheelus, Clarence Ford, Fred Smith, Amelia Lasater, Ezra Whitmore, and Louise Milam, who expressed a fixed opinion concerning punishment deprived Applicant of his right to a fair trial before an impartial jury, right to a reliable, non-arbitrary sentencing proceeding and right to due process of law as guaranteed by the Georgia Constitution and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

17. The trial court's refusal to excuse for cause at Applicant's second trial, juror Holmes Woodruff, who would give a presumption of truth to three police witnesses that he knew personally but would not give the same presumption to defense witnesses, deprived Applicant of his right to a fair trial before an impartial jury, right to a reliable, non-arbitrary sentencing proceeding, and right to due process of law as guaranteed by the Georgia Constitution and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

18. The trial court at Applicant's second trial would not allow Applicant's counsel to ask persons who expressed opposition to capital punishment whether they could consider the death penalty in certain cases and whether they could subordinate their personal feelings and follow the instruction of the Court. The trial court's action deprived Applicant of his right to effective assistance of counsel, right to a fair trial before a jury composed of a representative cross section of the community, right to a reliable non-arbitrary sentencing proceeding and right to due process of law as guaranteed by the Georgia Constitution and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

19. The trial court's jury instruction, at Applicant's second trial, concerning the impeachment of witnesses misstated the law and acted to remove the jury's authority to judge the credibility of witnesses in violation of Applicant's right to a fair trial, right to trial by jury, right to a reliable, non-arbitrary sentencing proceeding and right to due process of law as guaranteed by the Georgia Constitution and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

20. The actions of the prosecutors at both of Applicant's trials in striking all black persons from the trial juries violated Applicant's right to a fair trial before a jury composed of a representative cross-section of the community, right to a reliable, non-arbitrary sentencing proceeding, right to equal protection and due process of law as guaranteed by the Georgia Constitution and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Both prosecutors have a history of systematically eliminating black persons from trial juries.

21. Introduction at Applicant's second trial of evidence of the length of sentence received by Applicant for his prior convictions left the jury with the impression that Applicant would not serve a life sentence if sentenced to life imprisonment and thus violated Applicant's right to a fair trial, a reliable, non-arbitrary sentencing proceeding and due process of law as guaranteed by the Georgia Constitution and the Sixth, Eighth and Fourteenth Amendment to the United States Constitution.

22. The trial court's instruction to the jury during the punishment trial failed to explain the relation between aggravating and mitigating circumstances and failed to explain that mitigating circumstances could act to outweigh any aggravating circumstances found and, thus, require a sentence of life imprisonment rather than death.

The jury at Applicant's trial failed to understand that its verdict was binding on the court; the jury felt that its verdict was merely advisory and that the court would make the final determination on punishment.

The above errors violated Applicant's right to reliable non-arbitrary sentencing proceeding, protection from cruel and unusual punishment and due process of law as guaranteed by the Georgia Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

23. The death penalty is in fact administered and applied arbitrarily, capriciously, and whimsically in the State of Georgia; and Applicant was sentenced to die, and will be executed, pursuant to a pattern and practice of wholly arbitrary and capricious infliction of that penalty in violation of his rights guaranteed by the Eighth and Fourteenth Amendments to the Constitution of the United States.

a) The Supreme Court of the United States upheld the Georgia capital punishment statutes "on their face" only upon the assumption that the procedures mandated by the statutes would assure that sentences of death are not wantonly or freakishly imposed. Gregg v. Georgia, 428 U.S. 153, 198 (1976). As those statutes have been applied, however, death sentences in Georgia have in fact been imposed in an arbitrary and capricious manner. [1]

b) Georgia cases similar to that of Applicant in many respects, including both the nature and circumstances of the offense, the age, prior record, relative culpability, and life and character of the accused have resulted in lesser punishments than death.

c) Georgia cases more aggravated than that of Applicant in many respects, including both the nature and circumstances of the offense and the age, prior record, relative culpability, and life and character of the accused have resulted in lesser punishments than death.

d) There is no rational, constitutionally permissible way of distinguishing the few cases in which the death penalty has been imposed from the many cases in which it has not been imposed.

24. Applicant's death is being exacted pursuant to a pattern and practice of Georgia prosecuting authorities, courts, juries and Governors to discriminate on grounds of race, sex and poverty in the administration of capital punishment. For this reason, the imposition and execution of Applicant's death sentence under Georgia law and practice violate the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

a) The death penalty in the United States and in the State of Georgia has been discriminatorily imposed against males, poor persons and defendants accused of killing Caucasians.

b) Applicant's death sentence was imposed pursuant to the pattern of racial, economic and sexual discrimination set forth in paragraph (a) above.

25. The theoretical justifications for capital punishment are groundless and irrational in fact, and death is thus an excessive penalty which fails to serve any rational and legitimate social interests that can justify its unique harshness in violation of Applicant's right guaranteed by the Eighth and Fourteenth Amendments to the Constitution of the United States.

a) The death penalty provided by Georgia law violates the principle that a criminal sanction "cannot be so totally without penological justification that it results in the gratuitous infliction of suffering." Gregg v. Georgia, 428 U.S. 153, 183 (1976).

b) Executions do not have an identifiable deterrent effect. As the Georgia State Department of Offender Rehabilitation acknowledged in a November, 1973 study entitled Capital Punishment in Georgia: An Empirical Study 1943-1965, "Despite the fact that Georgia used the death penalty more often than any other state in the country, its homicide rate was also the highest in the nation. This suggests that the death penalty is not effective as a deterrent." Study at 451 (emphasis added).

c) Executions set socially sanctioned examples of, and provide an inducement to, violence.

d) Public sentiment for retribution is not so strong as to justify the use of the death penalty.

e) There is no penal purpose served by execution which is not more effectively or efficiently served by life imprisonment.

26. Applicant's juries at both trials were unrepresentative and biased in favor of the prosecution on the issue of Applicant's guilt or innocence of the crime with which he was charged and biased on the issue of sentence in violation of his rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

a) Social science research demonstrates that jurors without conscientious or religious scruples against capital punishment constitute an element of the community which, as a whole, tends to be baised in favor of the prosecution in resolving issues of guilt or innocence.

b) Exclusion of jurors because of their conscientious or religious scruples resulted in a jury in Applicant's case which was conviction-prone and incapable of rendering a fair an impartial verdict on guilt or innocence.

27 a) Applicant's conviction (Indictment No. 2234) for Larceny of a Motor Vehicle, in Troup County Superior Court May 1955 term, was obtained by an invalid guilty plea without Applicant having assistance of counsel, and was in violation of his Sixth, Eighth, and Fourteenth Amendment rights as guaranteed by the United States Constitution.

b) Applicant's conviction (Indictment No. 2448, pg. 360) for Larceny of a Motor Vehicle, in the Troup Superior Court, May 1957 Term, was obtained with an invalid guilty plea when Applicant did not have assistance of counsel, and was in violation of the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

c) Applicant's conviction (Indictment No. 2946, pg. 310) for Larceny of a Motor Vehicle, in the Troup County Superior Court, August 1959 Term, was obtained with an invalid guilty plea, when Applicant did not have assistance of counsel, and was in violation of his Sixth, Eighth and Fourteenth Amendment rights as guaranteed by the United States Constitution.

d) Applicant's convictions (Indictment Nos. 936, 937, 938, 939 pg. 231) for Pointing a Pistol at Another, Robbery by Use of an Offensive Weapon, Robbery by Force and Intimidation, and Larceny of a Motor Vehicle, in the Carroll County Superior Court, April 1960 Term, was obtained with an invalid guilty plea, when Applicant did not have assistance of counsel, and was in violation of his Sixth, Eighth, and Fourteenth Amendment rights as guaranteed by the United States Constitution.

e) Applicant's conviction (Indictment No. 588, pg. 1818) for Motor Vehicle Theft in the Troup County Superior Court, August 1974 Term, was obtained with an invalid guilty plea, when Applicant did not have the effective assistance of counsel, and was in violation of his Sixth, Eighth and Fourteenth Amendment rights as guaranteed by the United States Constitution.

28 a) The evidence in the guilt/innocence phase of the first trial was insufficient as a matter of law to convict the applicant of murder. Applicant's conviction based upon this evidence violated due process of law as guaranteed by the Georgia Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

b) Applicant's statements were necessary to obtain his conviction, and under Georgia law, as such, the statements must be accepted as true in their entirety. Owens v. State, 120 Ga 296, 48 S.E. 21 (1904); Futch v. State, 90 Ga. 472, 16 S.E. 102 (1892). These statements present a defense so that the evidence was insufficient as a matter of law to convict Applicant. Applicant's conviction on this evidence violated due process of law as guaranteed by the Georgia Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

29. Georgia Code Ann. §26-9606 (1962) removing duress (coercion) as a defense to murder, changing former law, is unconstitutional:

> Applicant was charged with malice murder at his first trial in the guilt/innocence phase, and Georgia Code Ann. §26-9606 had the effect of removing the prosecution's burden to prove malice and intent, essential elements of the crime, beyond a reasonable doubt. Taylor v. Kentucky, 436 U.S. 478 (1978); and violated applicant's right to a fair trial as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

30. Under Georgia Code Ann. §26-9606, duress is a defense to being held criminally liable as a "party to a crime" (26-801). The trial court in the guilt/innocence phase of applicant's first trial erred in failing to charge

the jury on: 1) Applicant's requested charge on accomplice liability; and, 2) Applicant's defense of duress/coercion (raised by his own statement which was admitted into evidence at the first trial and again at the re-trial. This error served to deprive applicant of his right to a fair trial and the due process of law protected by the Georgia Constitution and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

31. Georgia Code Ann. §59-805 is unconstitutional on its face, as applied in Georgia and as applied to applicant (in both trials) in that it allows prosecutors to use their peremptory challenges in a way which effectively eliminates all black persons from a jury trying applicant and deprives defendants in general and applicant (himself a black person) to their right to a fair trial, a jury composed of a true representative cross-section of the community, and right to a reliable, non-arbitrary sentencing procedure guaranteed by the Georgia Constitution and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

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Andrea I. Young
Joseph M. Nursey

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served counsel for the opposing party with a copy of the foregoing Application for Certificate of Probable Cause by placing same in the United States Mail with adequate postage attached thereto addressed to Mr. Michael J. Bowers, Attorney General, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgia 30334.

This 14th day of August, 1981.

Millard C. Farmer

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IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

CURFEW DAVIS,	•	
Petitioner,	•	
vs.	•	
WALTER D. ZANT, Warden, Georgia Diagnostic and Classification Center,	•	HABEAS CORPUS 4962
Respondent	•	
	•	
	•	

NOTICE OF APPEAL

Notice is hereby given that Curfew Davis, the above-named Petitioner, hereby appeals to the Supreme Court of Georgia from the order denying his Petition for Writ of Habeas Corpus dated July 17, 1981.

Petitioner is proceeding in forma pauperis.

The Supreme Court rather than the Court of Appeals, has jurisdiction of this appeal for the reason that the appeal involves Petitioner's conviction for a capital offense in which the death penalty was imposed.

Dated: August 6, 1981.

Joseph M. Nursey
Pamela L. J. Arangno
Millard C. Farmer
Andrea I. Young

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APPENDIX A

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Notice of Appeal by mail to Mr. Michael J. Bowers, Attorney General, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta 30334, by placing same in the United States Mail with adequate postage attached thereon.

This 6th day of August, 1981.

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APPENDIX A